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Deborah A. Melle v. Charles M. Bova : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DEBORAH A. MELLE,

Plaintiff/Appellee,

vs.

CHARLES M. BOVA,

Defendant/Appellant.

970118-CA

Case No. ~~960657~~-CA

Argument Priority 15

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the
Third District Court of
Summit County, State of Utah
THE HONORABLE FRANK G. NOEL
DISTRICT COURT JUDGE

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REPLY BRIEF OF APPELLANT

Defendant/Appellant (Husband) respectfully submits the following reply brief. This brief first addresses the seven points raised in Husband's Brief of Appellant and then addresses the five points raised in Wife's cross-appeal.[1]

[1]Wife's Brief of Appellee-Cross Appellant responded to Husband's appeal through Points I through VI. Wife commences her cross appeal with Point VII. Herein Husband addresses Points I through VII of his appeal and then addresses points VII through XI of Wife's cross appeal, citing Wife's Point VII as "Point VII Cross Appeal".

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN DOUBLE ASSESSING HUSBAND FOR SEA DOO DEBT AND HOUSEHOLD ITEMS, AND FOR ASSESSING HUSBAND FOR IRA FUNDS EXPENDED FOR THE BENEFIT OF BOTH PARTIES

SEA DOOS

Wife overlooks, or deliberately avoids, the essential fact that the trial court awarded Husband Sea Doos valued at only $7,500.00 while inequitably offsetting such amount by ordering Husband to assume $12,500.00 in debt associated therewith. This $5,000.00 error must be adjusted either by granting Husband $2,500.00 more in property or reducing the amount of his debt by such amount. The net adjustment must be to increase Husband's share of the home equity by $2,500.00.

HOUSEHOLD ITEMS

Wife does not dispute that Husband purchased at least $4,577.00 in personal property after the parties separated, which was awarded to Husband by the trial court. She, for the first time on appeal, questions whether such funds were purchased from proceeds of the IRA alleging a lack of documentary proof at trial. However, at trial Wife made no best evidence or other objection to Husband's Exhibit D-28 when it was received by stipulation. (R. 2317-8) Previously, during adverse examination of Husband, Wife only challenged the actual amount spent on childrens' furniture from the IRA, not that the funds came from the IRA. (R. 2313) Not having reserved such issue at trial, Wife is precluded from raising it on appeal. Utah R. Civ. P. 46; *Doe v. Hafen*, 772 P.2d 456 (Utah App. 1989), cert. denied, 800 P.2d 1105 (Utah 1990).

Further, it was uncontroverted that Husband's household items were purchased after the parties separated. Therefore, Husband was awarded property acquired after separation which was either acquired with the IRA proceeds, or, *arguendo*, Husband's post-separation income which was reserved to him by the trial court after payment of temporary child support and alimony. Either route improperly results in double-assessment to Husband.

Finally, the trial court having made no express finding on this issue, must be deemed to have accepted the values set forth in Exhibit D-28 as accurate, since Wife stipulated to such exhibit. (R. 2317) Certainly, nothing in the records indicates the contrary. The effect is to have double-assessed Husband $4,577.00 for personal property he received.

IRA VALUE ATTRIBUTABLE TO HUSBAND

Wife invites this Court to assume a finding which was never made by the trial court, to-wit: that the trial court deliberately intended to double-assess Husband for taxes he paid to punish Husband for removing funds from the IRA contrary to the Court's order. (Brief of Appellee-Cross Appellant, p. 27-8) However, nowhere in the findings of fact or in any ruling by the trial court did the trial court state that it intended to punish Husband by double-assessing him on the taxes he had previously paid. Rather, the trial court expressly required Husband to be responsible for the $6,210.00 tax penalty associated with Husband's unauthorized withdrawal of $62,100.00 from the IRA, clearly stating that such was Husband's sanction. (R. 1642-1643, Finding of Fact 12)

That the trial court ordered the parties to file a joint 1994 tax return and be equally responsible for the balance of taxes thereon shows the trial court's intent that the 1994 tax liability be equally shared by the parties, including the portion of taxes already paid by Husband with proceeds from the IRA. (R. 2317-2318, 2390-2391, 2440, 2505, Exh. D-28) The trial court made a math error in crediting Husband with still possessing $22,960.00 which Husband had long since expended for taxes owed equally by both parties.[2] This error must be corrected under *Endrody v. Endrody*, 914 P.2d 1166, 1170-1, (Utah App. 1996).

Cases cited by Wife do not apply herein as the trial court did not find that Husband had not expended the funds on taxes. Having received Exhibit D-28 by stipulation[3], the trial court made no such finding and, to the contrary, ordered only that Husband bear full responsibility for the $6,210.00 tax penalty associated with the early IRA withdrawal. As noted previously, Wife has waived any argument regarding lack of documentation by not having raised and reserved same at trial.

Mathematical errors by the trial court require that this Court adjust downwards Wife's share of the home equity by the amount of $21,756.00 as detailed in Brief of Appellant at page 22.

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[2]Wife never disputed that Husband had paid $44,640.00 in estimated taxes for 1994 as reflected by Exhibit D-19, and the court clearly found such to be true.

[3]Exhibit D-28 was Husband's accounting of use of the funds from the IRA. Wife did not challenge that $22,960.00 of the IRA funds were paid to the IRS during her adverse examination of Husband. (R. 2390-2391)

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER THE EXPENSE OF CAPITAL GAINS TAXES ON THE MARITAL HOME AND THEREBY ASSESSING ALL OF SUCH TAXES TO HUSBAND. FURTHER, THE NEW TAX LAW MAY SUBSTANTIALLY INCREASE HUSBAND'S TAX LIABILITY.

Appellant recognizes that since the date of trial and since Appellant filed his Brief of Appellant, Congress has changed the capital gains tax laws regarding sales of homes. However, contrary to Wife's contention, the change in the tax law may well result in a greater tax disaster to Husband.

Section 121 of Title 26 U.S.C. as recently amended is set forth in Appendix A. Under Section 121(b)(1) a $250,000.00 exclusion would be available to Husband provided he met the requirements of Section 121(a).[4] However, to qualify for the exclusion under Section 121(a), Husband must have owned and *resided in the home for at least two of the five years* preceding the date

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[4]Husband reserved this issue, when he argued to the trial court:

> The Court has also failed to consider the capital gains consequences. The capital gains should be divided equally or prorated based upon who derives the most profit from the sale of the house. (R. 1232)

The trial court was clearly on notice that taxes were being discussed by the words "capital gains consequences", as taxes are the most obvious and important "consequences" associated with capital gains. Exhibit D-24 shows that the home had equity of about $183,000.00 above the mortgage balance at time of trial. Wife argues that the record fails to reflect the $265,000.00 tax basis of the home. Even without an express record of the tax basis, it is clear that the home had a basis somewhere in excess of $176,165.10, the mortgage balance as of time of trial, thus showing that the capital gain could be as high as $183,000.00. (Exh. D-24) Therefore, the record was sufficient to make clear that a substantial tax issue needed to be addressed.

of sale. The home has not yet been sold. Even if, *arguendo*, it were to be sold by October 15, 1997, Husband would not qualify for the exclusion. Husband owned the home as of October 15, 1992, five years before the date of the hypothetical sale. However, Husband was ordered out of the home in August, 1994. Therefore, he would only have lived in the home between October 15, 1992, and August, 1994, a period of less than two years. With each day beyond October 15, 1997, that the home does not sell, Husband falls short another day of having met the two year residence requirement.

Section 121(c) is the typical nightmare of tax law drafting. It appears to entitle a home owner not meeting the requirements of Section 121(a) to a pro-rated use of the $250,000.00 exclusion to the extent a portion of the two years living requirement has occurred. Such pro-rated availability, however, would be contingent upon the owner meeting the requirement of Section 121(c)(2)(B), namely that "such sale or exchange is by reason of a change in place of employment, health, or, to the extent provided in the regulations, unforeseen circumstances." The sale of the home herein will not occur as the result of change of place of employment or for health reasons. No one knows what "unforeseen circumstances" means, but it may, or may not, apply to Husband because the home is being sold as the result of a decree of divorce which in and of itself may not be considered unforeseen. The change in the tax law may have been unforeseen, but the sale of the home may be argued to have been foreseen.

Thus Husband is at risk of not qualifying at all for the

$250,000.00 exclusion or any portion thereof. Whereas under prior law, Husband could have at least rolled over any gain into a subsequent home, Husband can no longer do so under the present law. Therefore, Husband now faces paying taxes on the entire capital gain for the year when the home sells. It is inequitable for Wife to receive most of the home equity, to have lived in the home for two years since the divorce was granted, and yet to bear no responsibility for capital gains taxes on the home.

It appears that this problem might be remedied to the benefit of both parties.[5] On remand, the trial court could find that Wife has always been an owner of the home and reform the deed to include her as a co-owner effective the original date of purchase. It could then award the home to Wife and order that it immediately be sold with equities to be divided as otherwise ordered by the trial court and, if applicable, as altered by this appeal process. Wife, would then have been an owner for over five years and would have lived in the home for over two years before the sale date. This strategy, if successful, would allow Wife to use a $250,000.00 exclusion and no taxes would result to the parties.

This Court must find that it was error for the trial court to not consider capital gains taxes. It must remand with instructions for the trial court to consider the new tax law and, unless

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[5]Husband's counsel on this appeal are not tax attorneys. While they believe this scenario might work, the trial court should receive evidence from a tax expert to verify potential usefulness of the strategy. The trial court should order that tax liabilities be shared by the parties if the strategy were to not work and should order the parties to share the expenses of the tax expert.

otherwise justified, reform the deed, order title to pass to Wife before the sale of the home with Wife ordered to claim the new $250,000.00 exemption and order that the parties' equities be distributed therefrom. To the extent that the strategy is not used, or does not work, the trial court must order Wife to pay one-half of the capital gains taxes assessed and one-half of any accountant and/or attorney's fees incurred in wrestling with the IRS.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING HUSBAND TO ASSUME ALL RESPONSIBILITY FOR THE HOME EQUITY LINE OF CREDIT WHERE $11,500.00 OF SUCH DEBT RESULTED FROM THE TRIAL COURT'S EXCESSIVE TEMPORARY SUPPORT ORDER

This issue was reserved and argued by Husband in Defendant's Written Comments to Court's Minute Entry. (R. 1231-1288) Husband therein argued, "The home equity line of credit was clearly used to pay marital debts, obligations and support, and not the Defendant's personal debt. Therefore, the parties should be held equally liable for the home equity line of debt." (R. 1237) Husband further argued, "Based upon the fact that throughout this proceeding the Court has taxed the Defendant with imputed income at a level which he has never earned, the Court should use its equitable powers to afford the Defendant relief in the form of a credit for the overpayments which he has made to the Plaintiff." (R. 1240)

As shown at pages 26 to 28 of Brief of Appellant, the trial court was confused in recalling loan balance amounts. Whether by accident or deliberate, it was an abuse of discretion for the trial

court to order Husband to pay the entire HELC balance where Husband had been ordered to pay excessive temporary support. In *Endrody*, the trial court properly declined to assess the husband the value of cattle sold for $20,000.00 to pay for temporary support where husband could not be employed at a level to supply such support. Similarly, herein it is uncontroverted that Husband was ordered to pay temporary support and expenses of $852.00 per month more than he was by final order based upon his income. Therefore, Wife must be ordered to pay one-half of the HELC balance above $14,000.00.

POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO IMPUTE FULL-TIME WORK INCOME TO WIFE FOR PURPOSES OF COMPUTING CHILD SUPPORT AND ALIMONY

Wife advances the specious argument that Husband needs to prove that Wife can work full-time. It is Wife's burden to prove that she cannot work full-time since it is her duty to support her children under Sections 78-45-4(1) and 78-45-7.5(6) and (7), Utah Code Annotated. Beyond this, the evidence clearly showed that Wife was capable of holding full-time employment, since she had such employment with Richards, Brandt, Miller & Nelson but left it to spend after-school time with the children. (R. 1967-1975)

However, the issue herein is the trial court's failure to consider Wife's ability to work without leaving early on days when the children are with their father. The trial court rested its decision upon its erroneous recollection of Dr. Stewart's recommendation (that both parents adjust their schedules) as being that Wife should work part-time. As shown at page 34 of Brief of

Appellant, Wife has 10 weekdays per month when she is free to work full days due to Husband having the children after school. She also has weekends and Husband's summer visitation to put in additional hours.

Wife's argument notwithstanding, she clearly testified that her job was very flexible. Therefore, the trial court erred in not imputing full-time income to Wife, or alternatively, in not reducing Husband's income to part-time based upon his need to be at home with the children on the ten days each month that he has the children after school.

POINT V

THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING CHILD SUPPORT BY IMPUTING 100 PERCENT OF INCOME AT THE MAXIMUM TABLE AMOUNT TO HUSBAND AND ZERO TO WIFE WHERE HUSBAND'S INCOME DID NOT MEET THE MAXIMUM AMOUNT AND WIFE HAD SUBSTANTIAL INCOME

Wife does not directly reply to this point but presents her own appeal on the issue in Point IX of her cross-appeal. Husband rests upon his prior argument and on his reply to Point IX of Wife's cross-appeal.

POINT VI

THE TRIAL COURT ABUSED ITS DISCRETION IN NOT AWARDING THE TAX DEPENDENCY EXEMPTIONS TO HUSBAND

Under *Breinholt v. Breinholt*, 905 P.2d 877, 881 (Utah App. 1995), the trial court had the duty to enter specific findings explaining its failure to award the exemptions to Husband. It did not do so and did not explain why it should not do so where it ordered Husband to pay maximum support under the table, granted Husband extensive visitation of the children with related living

expenses, did not require Wife to work full-time, granted Wife far more than one-half of the marital property and granted Wife attorney's fees where they were unwarranted. Under these conditions, the matter must be remanded for such consideration.

POINT VII

THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING WIFE ATTORNEY'S FEES WHERE WIFE WAS WITHOUT NEED, HUSBAND WAS WITHOUT ABILITY TO PAY AND ADEQUATE FINDINGS WERE NOT ENTERED

Wife's argument inaccurately, but repeatedly stresses that Husband incurred and had the ability to pay $24,000.00 in attorneys' fees. However, such misrepresents the fact that while Husband incurred fees, he was not able to pay them. Attorney's liens over $43,000.00 were entered against Husband's share of the home equity because Husband's fees had not been paid. (R. 1730) This, plus Husband's inadequate share of the property award, leaves Husband with little ability to pay Wife's fees. Further, Wife's much greater than half award of the property left her with the ability to pay her own fees.

As argued in Brief of Appellant, the trial court received no evidence to support Wife's contention that the $15,000.00 fees awarded Wife arose from Husband's applications for relief from the excessive temporary support order. There is no evidentiary basis to support such a finding of bad faith, or to show the actual amount of fees which arose from Husband's applications for relief.

CROSS-APPEAL

POINT VII (Cross-appeal)

THE TRIAL COURT DID NOT ERR IN FAILING TO INCLUDE INCOME FROM HUSBAND'S SECOND JOB IN COMPUTING HIS TOTAL MONTHLY INCOME FOR ALIMONY AND CHILD SUPPORT PURPOSES

Objection

Husband, initially objects to this issue being considered because Wife fails to marshal the evidence regarding her cross-appeal. A cross-appellant, no less than an appellant, must "marshal the evidence supporting the trial court's pertinent findings". *Selvage v. J.J. Johnson & Associates*, 910 P.2d 1252, 1260 (Utah App. 1996) A complete failure to marshal or a selective failure to marshal such evidence is grounds for this Court to decline to address an issue appealed. (*id.*) Wife herein misrepresents or selectively cites to the record. Without waiving such objection, Husband addresses Wife's claim as follows:

The trial court did not merely rely upon Husband's 1994 W-2. The trial court reviewed Husband's 1993 and 1994 income tax returns and his 1993 and 1994 W-2 tax statements before it "determined that Defendant's 1994 income as set forth on his W-2 form from the Spine Center is the best indicator of the Defendant's income prior to the filing of this matter." (Finding of Fact 6, R. 1638) The trial court also heard extensive testimony regarding Husband's employment and income.[6] (R. 153-166, 189-224, 267, 365-403, Exh. D-12)

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[6]This was not a case involving self-employment where gross income was unclear. All of Husband's income is reflected by W-2's or 1099's.

Also contrary to Wife's representation, the record does not show that Husband "works only twenty-six hours per week at the Spine Center to earn his income." (Brief of Appellee/Cross Appellant, page 34) Husband testified that he was working "40-plus hours per week". (R. 2294) His reference to 26 hours was to "clinical hours" which are only a part of his full-time employment as a physician:

> A Yes. You interrupted me and I was explaining that my schedule hasn't been represented, so that puts me at about 26 clinical hours in the office, and then I have about half hour of dictation for each clinical hour, which puts me at 39 hours. And then I have studying and reading and research, and continuing medical education in addition to that. And that is more than I worked the previous year.

(R. 2295)[7]

While it is undisputed that Husband took a second job reviewing files for the Utah Worker's Compensation fund in 1995[8], such additional work was undertaken after the parties had separated in August, 1994, and was necessitated by the trial court's over-assessment of temporary support to be paid by Husband. The trial court accepted evidence of the second job acknowledging that it needed to determine whether the job was "moonlighting or not." (R.2300-1) The trial court properly determined that the job was moonlighting and declined to include it in determining Husband's

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[7]Wife's failure to cite the foregoing portions of the record clearly constitute failure to marshal the evidence.

[8]Husband testified that between April, 1995 and September, 1995, he was paid $1,635.00 by the Workman's Compensation Fund. He had worked for them four hours during the month immediately prior to trial at $125 per hour, thus making about $1,000.00 during that month only. (R. 2301)

historical earnings.

Wife's reliance upon *Breinholt v. Breinholt*, 905 P.2d 877, 880 (Utah App. 1995), is misplaced. In *Breinholt*, the evidence showed that the parties had, during the marriage, relied upon husband's second check received from serving with the county commission to pay household expenses. This Court therein stated,

> ... This court has previously held that when determining an alimony award, "it is appropriate and necessary for a trial court to consider all sources of income that were used by the parties during their marriage to meet their self-defined needs, from whatever source--overtime, *second job*, self-employment, etc., as well as *unearned income*. ...

(underlined emphasis added.) In this case, at no time before the parties separated in August, 1994, had the parties relied upon Husband working more than one job. Wife has cited nothing from the record to show that Husband had ever held multiple jobs "during [the parties'] marriage to meet their self-defined needs."[9]

Wife's argument acknowledges that Husband took his second job in 1995 after the parties had separated and this action was pending. (Brief of Appellee/Cross Appellant, page 34-5). Therefore, the trial court was well within its discretion in finding that such additional job was moonlighting necessitated by additional living expenses associated with supporting two

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[9]Two winters prior to the separation of the parties, Husband had acted as a ski instructor in order to obtain ski discounts. (R. 2258) Husband earned about $800 in 1993 as a ski instructor. (R. 2494) Wife testified that Husband had not been a ski instructor during the winter (1993-4) preceding the parties' separation in August, 1994. (R. 2258) The trial court was clearly within its discretion to disregard Husband's one-time ski instructing as recreational and insignificant in terms of income.

households following the parties' separation and with Husband's high temporary support obligation. A contrary rule would improperly discourage spouses from taking additional employment pending divorce proceedings to meet related financial crises.

POINT VIII

THE TRIAL COURT PROPERLY ASSESSED WIFE WITH HER PORTION OF THE TAX BURDEN ASSOCIATED WITH THE IRA FUNDS

Objection

Husband, initially objects to this issue being considered because Wife fails to marshal the evidence regarding her cross-appeal. A cross-appellant, no less than an appellant, must "marshal the evidence supporting the trial court's pertinent findings". *Selvage v. J.J. Johnson & Associates*, 910 P.2d 1252, 1260 (Utah App. 1996) A complete failure to marshal or a selective failure to marshal such evidence is grounds for this Court to decline to address an issue appealed. (*id.*) Wife herein simply cites the finding of fact she disputes. Her argument has no other citations to the record. Without waiving such objection, Husband addresses Wife's claim as follows:

As previously shown in Point I, Wife received a vastly greater share of the marital property than did Husband. Further, Husband used $22,960.00 of the IRA funds to pay taxes, which benefitted both parties and the value of such funds were no longer available to Husband at the time of trial although they were credited to Husband's property settlement.

Husband's share of the home equity was charged $29,597.00 as Wife's net share of the $75,000.00 removed from the IRA by Husband.

Wife had previously received $6,450.00 in benefits from the $12,900.00 withdrawal authorized by the Court. Since Wife effectively received $36,047.00 of the IRA, and since Husband did not have equal property existing to be awarded to him, requiring Wife to pay one-half of the taxes associated with the IRA, and all but $645.00 of the penalty, was most reasonable and an appropriate use of the Court's discretion.

Additionally, the trial court appropriately found "that the parties will save money if they are required to file jointly for tax year 1994." Indeed, such joint filing reduced the combined tax burden that would have had to be allocated between the parties if they had filed separately.

When it is recognized that $22,960.00 of the IRA funds were paid by Husband for 1994 taxes in August, 1994, for both parties' benefit and were not available to be divided at time of trial[10], Wife must pay one-half of the taxes on such funds in order that the parties equally share the tax obligation. Taxes owed on the $22,960.00 used to pay the parties' taxes must be equally shared between the parties.

Husband was required to pay $6,855.00 of the penalty associated with early withdrawal of the $75,000.00, while Wife was required to pay only $645.00 associated with her one-half of the $12,900.00 authorized to be withdrawn by the Court. The parties resided together most of 1994. Therefore, Wife was not prejudiced by the allocation of 1994 tax responsibility.

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[10]As argued in Point I.

POINT IX

THE TRIAL COURT SHOULD NOT HAVE EXTRAPOLATED BEYOND THE CHILD SUPPORT TABLE TO CALCULATE CHILD SUPPORT.

OBJECTION

Husband, initially objects to this issue being considered because Wife fails to marshal the evidence regarding her cross-appeal. A cross-appellant, no less than an appellant, must "marshal the evidence supporting the trial court's pertinent findings". *Selvage v. J.J. Johnson & Associates*, 910 P.2d 1252, 1260 (Utah App. 1996) A complete failure to marshal or a selective failure to marshal such evidence is grounds for this Court to decline to address an issue appealed. (*id.*) Wife fails to even cite the finding she disputes, let alone the factual record. Without waiving such objection, Husband addresses Wife's claim as follows:

Wife's argument on this point is void of factual or legal references in the record to support her argument. Also, her claim at page 39 of her brief that sports activities are not anticipated by support figures set forth in the Table for determining support levels is not supported by citation to any legal authority. Wife fails to acknowledge that Husband's visitation time with the children is much greater than that provided in the standard visitation schedule[11] and that Husband's expenses associated with food and other necessities for the children is higher than that anticipated by the Table in any event.

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[11]See Brief of Appellant, Point IV, page 34, Point V, pages 36.

Husband has fully addressed this issue in Point V of Brief of Appellant, pages 35-40. Rather than repeat himself, Husband respectfully refers the Court thereto. The Court erred in assessing 100 percent of the parties' income to Husband and should have assessed support at $1,120.00 rather than $1,400.00. Wife certainly is not entitled to a windfall of child support greater than $1,400.00 where Husband has possession of the children so much of the time.

POINT X

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING WIFE'S MOTION FOR NEW TRIAL BASED UPON NEWLY-DISCOVERED EVIDENCE THAT HUSBAND DISSIPATED MARITAL ASSETS

Objection

Husband, initially objects to this issue being considered because Wife fails to marshal the evidence regarding her cross-appeal. A cross-appellant, no less than an appellant, must "marshal the evidence supporting the trial court's pertinent findings". *Selvage v. J.J. Johnson & Associates*, 910 P.2d 1252, 1260 (Utah App. 1996) A complete failure to marshal or a selective failure to marshal such evidence is grounds for this Court to decline to address an issue appealed. (*id.*) Wife herein simply cites the ruling she disputes. Her argument has no other citations to the record.

Further, Wife's statements that she "learned for the first time during trial that Dr. Bova had set up a trust for his daughter" is a complete misrepresentation to this Court. At trial Wife introduced Exhibit P-9 (R. 2173-2174, 2203), a portfolio

listing which included the Strong Discovery Fund balance as of October 7, 1995. Wife was obviously aware of the fund before she went to trial since it was she who brought Exhibit P-9 to court. Without waiving his failure to marshal objection, Husband addresses Wife's claim as follows:

As shown, Wife prior to trial was aware of the existence of the "trust fund" established on behalf of Husband's daughter, Melissa. She introduced Exhibit P-9 (R. 2173, 2203) and requested that her share of the marital estate be enhanced by monies paid by Husband into irrevocable gift accounts for the parties' two children, Mikell and Christopher, and for Melissa, Husband's daughter by a prior marriage. (*id.*) The trial court never made such adjustment in its rulings.[12] Such was proper as the children, not Husband, benefitted from such accounts and there was no evidence provided that Husband had unreasonably established or funded such accounts.

Wife, being aware of the accounts set forth in Exhibit P-9, was obligated through discovery procedures to obtain additional information of the account status prior to trial, if she intended to make the amounts of the accounts an issue at trial. This she failed to do. In the case *In re State of Utah, in the Interest of J.P., K.D., and K.D.*, Persons under Eighteen Years of Age, 921 P.2d 1012, 1017, (Utah App. 1996) this Court stated,

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[12]Wife's argument creates the erroneous impression that Wife had asked only that she be credited one-half of the value of funds paid to Melissa's account, whereas Wife testified that she desired to be credited one-half of the funds deposited into all three children's accounts. (R. 2173)

> Under established Rule 59 case law, the moving party must prove the evidence offered meets three requirements for a new trial to be granted. > Id. at 57-58. "First, it must be material, competent evidence which is in fact newly discovered. Second, it must be such that it could not, by due diligence, have been discovered and produced at trial." > Id. at 58. "Finally, it must not be merely cumulative or incidental, but must be of sufficient substance that there is a reasonable likelihood that with it there would have been a different result." > Id. Additionally, "[n]ewly discovered evidence must relate to facts which were 'in existence at the time of trial.' " > In re Disconnection of Certain Territory, 668 P.2d 544, 549 (Utah 1983) (citation omitted); see > In re S.R., 735 P.2d at 58.

The trial court properly denied Wife's motion on the second requirement above set forth, to-wit: "that the Court believes the information upon which the Motion is based was available to Plaintiff through discovery prior to trial." (R. 1855) Wife should have obtained the account records during discovery, if she intended to make them an issue.[13]

POINT XI

WIFE SHOULD NOT BE AWARDED ATTORNEY'S FEES INCURRED ON APPEAL

Objection

Husband, initially objects to this issue being considered because Wife fails to marshal the evidence regarding her cross-appeal. A cross-appellant, no less than an appellant, must "marshal the evidence supporting the trial court's pertinent findings". *Selvage v. J.J. Johnson & Associates*, 910 P.2d 1252, 1260 (Utah App. 1996) A complete failure to marshal or a selective

[13]The trial court would have been further correct in denying the motion on the first and third requirements as the "new" evidence was not really newly new and would have been cumulative or incidental in any effect.

failure to marshal such evidence is grounds for this Court to decline to address an issue appealed. (*id.*) Wife herein simply asks for attorney's fees on appeal without providing any factual record regarding her need, Husband's ability to pay, and reasonableness.

In Point V of Brief of Appellant, Husband fully addresses the legal requirements for an award of attorney's fees and shows 1) that Wife had no need for an award of attorney's fees at trial given her generous property award, 2) that given the gross inequity of the property division and his own fees, Husband was without ability to pay Wife's fees, and 3) that Wife had provided no evidentiary basis regarding the reasonableness of the award of attorney's fees awarded at trial.

Husband's appeal is clearly based upon good faith issues which require review by this Court. Wife should not be awarded attorney's fees on appeal.

CONCLUSION

Neither party has challenged the decree granting each party a divorce. However, the other rulings of the trial court addressed herein must be reversed and the case remanded as requested by Husband. The trial court must be instructed to properly credit Husband's property settlement $21,756.50; to order that the home be deeded to, and immediately sold by Wife with the parties' equities protected, or, with Wife to be responsible for one-half of the capital gains taxes from the sale of the home and any professional fees paid to tax experts; to order Wife to be responsible for one-

half of the home equity loan balance between $14,000.00 and $25,435.00 [($25,435.00-$14,000.00)/2=$5,717.50]; to impute full-time income to Wife for purposes of child support and alimony; to allocate child support *pro rata* on the parties' incomes at a maximum income of $10,000.00 as set forth in Husband's prior brief; to award Husband the tax dependency exemptions; and to order Wife to pay her own attorney's fees.

Wife's appeal must be rejected on all points, but if upheld on any point, such change must indicate how other rulings may be adjusted thereby. For example, if Wife were to be awarded more child support, she would need less alimony and there would be even less need for her to recover her attorney's fees or for her to receive the exemptions/deductions for the children.

DATED this 14th day of October, 1997.

PAUL W. MORTENSEN
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed 2 true and correct copies of **APPELLANT'S REPLY BRIEF** to the following individual at the address shown, via first-class mail, postage prepaid on this 14th day of October, 1997:

Rodney R. Parker
Attorney at Law
PO Box 45000
Salt Lake City, Utah 84145-5000

ADDENDUM

APPENDIX A: IRS Code Section 121

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H.R.2014

Taxpayer Relief Act of 1997 (Enrolled Bill (Sent to President))

SEC. 312. EXEMPTION FROM TAX FOR GAIN ON SALE OF PRINCIPAL RESIDENCE.

(a) IN GENERAL- Section 121 (relating to one-time exclusion of gain from sale of principal residence by individual who has attained age 55) is amended to read as follows:

`*SEC. 121. EXCLUSION OF GAIN FROM SALE OF PRINCIPAL RESIDENCE.*

`(a) EXCLUSION- Gross income shall not include gain from the sale or exchange of property if, during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more.

`(b) LIMITATIONS-

`(1) IN GENERAL- The amount of gain excluded from gross income under subsection (a) with respect to any sale or exchange shall not exceed $250,000.

`(2) $500,000 LIMITATION FOR CERTAIN JOINT RETURNS- Paragraph (1) shall be applied by substituting `$500,000' for `$250,000' if--

`(A) a husband and wife make a joint return for the taxable year of the sale or exchange of the property,

`(B) either spouse meets the ownership requirements of subsection (a) with respect to such property,

`(C) both spouses meet the use requirements of subsection (a) with respect to such property, and

`(D) neither spouse is ineligible for the benefits of subsection (a) with respect to such property by reason of paragraph (3).

`(3) APPLICATION TO ONLY 1 SALE OR EXCHANGE EVERY 2 YEARS-

`(A) IN GENERAL- Subsection (a) shall not apply to any sale or exchange by the taxpayer if, during the 2-year period ending on the date of such sale or exchange, there was any other sale or exchange by the taxpayer to which subsection (a) applied.

`(B) PRE-MAY 7, 1997, SALES NOT TAKEN INTO ACCOUNT- Subparagraph (A) shall be applied without regard to any sale or exchange before May 7, 1997.

`(c) EXCLUSION FOR TAXPAYERS FAILING TO MEET CERTAIN REQUIREMENTS-

`(1) IN GENERAL- In the case of a sale or exchange to which this subsection applies, the ownership and use requirements of subsection (a) shall not apply and subsection (b)(3) shall not apply; but the amount of gain excluded from gross income under subsection (a) with respect to such sale or exchange shall not exceed--

`(A) the amount which bears the same ratio to the amount which would be so excluded under this section if such requirements had been met, as

`(B) the shorter of--

`(i) the aggregate periods, during the 5-year period ending on the date of such sale or exchange, such property has been owned and used by the taxpayer as the taxpayer's principal residence, or

`(ii) the period after the date of the most recent prior sale or exchange by the taxpayer to which subsection (a) applied and before the date of such sale or exchange,

bears to 2 years.

`(2) SALES AND EXCHANGES TO WHICH SUBSECTION APPLIES- This subsection shall apply to any sale or exchange if--

`(A) subsection (a) would not (but for this subsection) apply to such sale or exchange by reason of--

`(i) a failure to meet the ownership and use requirements of subsection (a), or

`(ii) subsection (b)(3), and

`(B) such sale or exchange is by reason of a change in place of employment, health, or, to the extent provided in regulations, unforeseen circumstances.

`(d) SPECIAL RULES-

`(1) JOINT RETURNS- If a husband and wife make a joint return for the taxable year of the sale or exchange of the property, subsections (a) and (c) shall apply if either spouse meets the ownership and use requirements of subsection (a) with respect to such property.

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H.R.2014

Taxpayer Relief Act of 1997 (Enrolled Bill (Sent to President))

SEC. 311. MAXIMUM CAPITAL GAINS RATES FOR INDIVIDUALS.

(a) IN GENERAL- Subsection (h) of section 1 (relating to maximum capital gains rate) is amended to read as follows:

`(h) MAXIMUM CAPITAL GAINS RATE-

`(1) IN GENERAL- If a taxpayer has a net capital gain for any taxable year, the tax imposed by this section for such taxable year shall not exceed the sum of--

`(A) a tax computed at the rates and in the same manner as if this subsection had not been enacted on the greater of--

`(i) taxable income reduced by the net capital gain, or

`(ii) the lesser of--

`(I) the amount of taxable income taxed at a rate below 28 percent, or

`(II) taxable income reduced by the adjusted net capital gain, plus

`(B) 25 percent of the excess (if any) of--

`(i) the unrecaptured section 1250 gain (or, if less, the net capital gain), over

`(ii) the excess (if any) of--

`(I) the sum of the amount on which tax is determined under subparagraph (A) plus the net capital gain, over

`(II) taxable income, plus

`(C) 28 percent of the amount of taxable income in excess of the sum of--

`(i) the adjusted net capital gain, plus

`(ii) the sum of the amounts on which tax is determined under subparagraphs (A) and (B), plus

`(D) 10 percent of so much of the taxpayer's adjusted net capital gain (or, if less,

taxable income) as does not exceed the excess (if any) of--

`(i) the amount of taxable income which would (without regard to this paragraph) be taxed at a rate below 28 percent, over

`(ii) the taxable income reduced by the adjusted net capital gain, plus

`(E) 20 percent of the taxpayer's adjusted net capital gain (or, if less, taxable income) in excess of the amount on which a tax is determined under subparagraph (D).

`(2) REDUCED CAPITAL GAIN RATES FOR QUALIFIED 5-YEAR GAIN-

`(A) REDUCTION IN 10-PERCENT RATE- In the case of any taxable year beginning after December 31, 2000, the rate under paragraph (1)(D) shall be 8 percent with respect to so much of the amount to which the 10-percent rate would otherwise apply as does not exceed qualified 5-year gain, and 10 percent with respect to the remainder of such amount.

`(B) REDUCTION IN 20-PERCENT RATE- The rate under paragraph (1)(E) shall be 18 percent with respect to so much of the amount to which the 20-percent rate would otherwise apply as does not exceed the lesser of--

`(i) the excess of qualified 5-year gain over the amount of such gain taken into account under subparagraph (A) of this paragraph, or

`(ii) the amount of qualified 5-year gain (determined by taking into account only property the holding period for which begins after December 31, 2000),

and 20 percent with respect to the remainder of such amount. For purposes of determining under the preceding sentence whether the holding period of property begins after December 31, 2000, the holding period of property acquired pursuant to the exercise of an option (or other right or obligation to acquire property) shall include the period such option (or other right or obligation) was held.

`(3) NET CAPITAL GAIN TAKEN INTO ACCOUNT AS INVESTMENT INCOME- For purposes of this subsection, the net capital gain for any taxable year shall be reduced (but not below zero) by the amount which the taxpayer takes into account as investment income under section 163(d)(4)(B)(iii).

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